IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 156 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ARVINDBHAI NAROTTAMBHAI

Versus

ASSISTANT COMMISSIONER OF INCOMETAX

Appearance:
MR JP SHAH for Petitioner
MR M.J. THAKORE instructed by MR MANISH R BHATT
for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.
Date of decision: 29/01/97

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The petitioner has challenged the order dated 20th December, 1996 made by the Assistant Commissioner of Income Tax, Central Circle 1(1), Ahmedabad under Section 220(6) of the Income Tax Act, rejecting the application

for stay made by the petitioner.

The demand of Rs. 17,55,546/- was raised in case of the assessee for the assessment years 1993-94 on account of disallowance of short-term capital loss claimed on the sum received on account of renunciation of right to subscribe to 12,653 debentures of Arvind Mills. The assessee had computed the cost thereof on the basis of Rs. 200/- per debenture pursuant to his renouncing the right to subscribe and on the basis of the difference between the market quotation "cum-right" share last quoted and "ex-right" share first quoted to be the cost and from that deducted the sum of Rs. 25,30,600/arriving at a loss of Rs. 58,20,300/-. The Assessing Officer however, held that the cost of acquisition was `nil' and therefore, the entire sale price was taxable short-term capital gains as discussed in the assessment order. That order was appealed against by the assessee and the assessee made an application for stay of the demand till disposal of the appeal. The case of the petitioner was that the matter was covered by the principles laid down by the Supreme Court in Dhun Dadabhoy Kapadia Vs. CIT reported in 63 ITR 651 and the orders made in another group of cases of similar nature of Sunil Siddharthbhai, Siddharthbhai Kasturbhai and Manan Niranjanbhai by the CIT (Appeals), wherein it was held that there will not be any taxable gain because of the decision of the Supreme Court in Shrinivas Shetty's case, reported in 128 ITR 294, and therefore, there will be no tax demand even in the assessment year 1993-94 even if the capital loss was disallowed.

Under the provisions of Section 220(6) of the said Act, where an assessee presents an appeal under Section 246, the Assessing Officer is empowered in his discretion and subject to such condition as may be imposed by him, to treat the assessee as not being in default in respect of the amount in dispute in the appeal as long as the appeal remains undisposed of. It is obvious that the discretion vested with the Assessing Officer is to be exercised on sound judicial principles and the provision does not vest the Assessing Officer with any arbitrary power. Under the impugned order the assessing officer has concentrated more on justifying the passing of the assessment order rather than considering whether any case was made out for treating the assessee as not in default in the context of the provisions of Section 220(6) and the guidelines issued by the Board in that regard. He has commented adversely on the approach of the Calcutta High Court and has also assailed the order made in similar matters by CIT (Appeals) by

observing, rather uncharitably that the view of the CIT (Appeals) was patently wrong. He refers to the decision of the Calcutta High Court in the case of Oberoi Building Investment Pvt.Ltd. reported in 203 ITR 403 on which reliance was placed by the assessee and passes a remark that the Calcutta High Court had mechanically followed the judgement of the Supreme Court. Even as regards the decisions of the Supreme Court which were cited before him, he had a comment to offer alleging that there was inconsistency as regards the method of valuation when he observed in para (3) that..."the Hon'ble Supreme Court has also not followed the consistent method of valuation of bonus shares ...." The Officer ought to have remembered that he was not writing any academic thesis in the matter and should have kept in mind that he was a quasi-judicial officer who was expected to exercise control and limit over his language and comments while referring to the decision of the superior Courts. We expect the officer to be more circumvent in future in expressing his views and leave the matter at that.

The assessee had relied upon the circulars of the Board which are referred to in paragraph 7 of the petition, more particularly circular No.530 dated 6.3.1989, which came to be considered by a Division Bench of this Court (to which my esteemed brother Hon'ble Mr.Justice Balia was a party), in Madhu Silica's case reported in 1996 Tax L.R 521, in which the Court through my esteemed brother held that it was apparent from the Board's circular No.530 dated 6.3.1989 and the relevant provisions of the Act that in the case where the assessee has preferred an appeal under Section 246, the Assessing Officer has been vested with the discretion to treat the assessee as not being in default in respect of the amount in dispute in an appeal as long as the appeal remains undisposed of and that power being discretionary, general guidelines laying down the circumstances in which the assessee may be treated not being in default were issued by the Board in exercise of its powers under Section 119 of the Act and accordingly, as per clause 2 of the said circular where the demand in dispute related to issues that were decided in favour of the assessee in an earlier order by an appellate authority or Court in the assessee's own case, the assessee is not to be treated being in default in respect of the amount in dispute in appeal.

It will be noted from the said circular that where the demand in dispute had arisen because the Assessing Officer had adopted an interpretation of law in respect of which one or more High Courts or the High

Court of jurisdiction had adopted any contrary interpretation but the Department had not accepted that judgement, then also the assessee was not to be treated in default in respect of the amount in dispute during the pendency of the appeal. From the impugned order itself it is clear that the Assessing Officer had found conflict between various decisions which were referred to and in which he had his own comments to offer as regards the decisions of the superior courts. Therefore, the only thing which he was required to do was to exercise discretion of treating the assessee as not being in default during the pendency of the appeal.

It was brought to the notice of the Assessing Officer by letter dated 28.9.96, a copy of which is at annexure "F" to the petition that appeals were filed before the CIT (Appeals) in cases of Sunil Siddharthbhai, Siddharth kasturbhai and Manan Niranjanbhai, which were the matters of the same group of cases and the CIT (Appeals) had taken a view that as per the decision of the Supreme Court in Shrinivas Shetty's case (supra), there will not be any capital gain on the sale of right renounced. A copy of the decision of the CIT (Appeals) in Sunil Siddharthbhai's appeal is pointed out to us and it is clear therefrom that it was held that the assessee's contention regarding short-term capital gains was acceptable because principle of Shrinivas Shetty's case was applicable to the facts of the case and therefore, the action of the Assessing Officer for taxing the capital gains could not be upheld. The addition made for short-term capital gains was therefore, deleted. Even if that case was not decided in assessee's own matter, while exercising discretion under Section 220(6) of the I.T Act, this decision was an important factor to be taken into account and had a bearing even apart from the circular No.530 which does not curtail the discretionary powers statutorily conferred on him. In our opinion there is no escape from the conclusion that in the present case the assessee could not be treated as an assessee in default in respect of the demand of tax for the assessment year 93-94. In our view therefore when conditions for exercise of the discretionary power which was vested in the Assessing Officer were shown to exist, he was bound to exercise the discretion in favour of the assessee by ordering that the assessee should not be treated as in default during the pendency of the appeal.

The impugned order dated 20.12.1996 at annexure "J" rejecting the assessee's application cannot therefore sustained and is hereby set aside with a direction that the Assessing Officer will issue a fresh order under

Section 220(6) of the Act treating the assessee as not in default in respect of the demand in accordance with law, within one week from the date of the receipt of the writ of this order. Until then, the assessee will not be treated as in default in context of the demand notice. Rule is made absolute accordingly with no order as to costs.
